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ROBINSON, MCFADDEN & MOORE, P.C.

COLUMBIA | GREENVILLE

January 19, 2005

**HAND DELIVERED**

Mr. Charles Terreni  
Chief Clerk of the Commission  
Public Service Commission of South Carolina  
Synergy Business Park, Saluda Building  
101 Executive Center Drive  
Columbia, SC 29210

**Re: SCE&G Rate Case  
Docket No. 2004-178-E**

Dear Mr. Terreni:

Enclosed for filing please find Columbia Energy LLC's Petition for Clarification or Reconsideration of Order No. 2005-2 in the above-referenced docket. By copy of this letter we are serving the same on all parties of record. Please stamp the extra copy provided as proof of filing and return it with our courier. Should you need any additional information, please contact me.

Yours truly,

ROBINSON, MCFADDEN & MOORE, P.C.

Frank R. Ellerbe, III

FRE/bds  
Enclosure

cc/enc: All parties of record  
Douglas C. Turner, Esquire  
Dan F. Arnett, ORS Chief of Staff

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BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA

Docket No. 2004-178-E

In re:	)	
	)	
South Carolina Electric & Gas	)	<b>COLUMBIA ENERGY LLC's</b>
Company—Application for	)	<b>PETITION FOR CLARIFICATION OR</b>
Adjustments in the Company's	)	<b>RECONSIDERATION OF</b>
Electric Rate Schedules and Tariffs	)	<b>ORDER NO. 2005-2</b>
	)	
_____	)	

Columbia Energy LLC ("Columbia Energy") respectfully submits this petition for clarification or reconsideration in the above captioned matter pursuant to S.C. Code Ann. Section 58-27-2150 and 26 S.C. Regs. 103-881 and 103-836(A)(4). Columbia Energy petitions the Public Service Commission of South Carolina ("Commission") to rehear and/or reconsider Order No. 2005-2 dated January 6, 2005 ("Order") in regard to its decision to open a generic docket to explore a formal RFP process for utilities that are considering alternatives for adding generating capacity. In support Columbia Energy would show the following:

1. Columbia Energy intervened as a formal party of record in this docket.
2. In Order No. 2005-2, the Commission determined that "the use of a formal competitive solicitation process, under appropriate circumstances, could produce low-cost, reliable power resources for South Carolina consumers." Order, p. 51. The Commission also noted that if it determined that competitive bidding should be the required method for obtaining new capacity, those requirements would apply to all South Carolina jurisdictional electric utilities. *Id.* The Commission decided to open a

generic docket to explore a formal RFP process for utilities that are considering alternatives for adding generating capacity. Order, p. 52.

3. Columbia Energy supports the Commission's decision to open a proceeding to investigate the establishment of rules which would require an RFP process for the addition of capacity. However, Columbia Energy submits that the Commission's decision to conduct the examination in the form of a generic proceeding is in violation of the Administrative Procedures Act, S.C. Code § 1-23-10 *et seq.*, and is therefore affected by an error of law.

4. Under South Carolina law, rulemaking by the Commission can be accomplished only by promulgating a regulation in accordance with the procedures set forth in S.C. Code Ann. Section 1-23-110 and subject to approval by the General Assembly pursuant to S.C. Code Ann. Section 1-23-120.

5. The Commission is a "state agency" as defined by S.C. Code Ann. Sections 1-23-10(1) and 1-23-310(2). The Commission, in Order 2005-2, recognized that an RFP process could be beneficial to South Carolina consumers who are served by all jurisdictional electric utilities and not just those served by SCE&G. In order to make its conclusions and decisions regarding an RFP process generally applicable the Commission should promulgate regulations. "Regulation" is defined under S.C. Code Ann. Section 1-23-10(4).

"Regulation" means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law. The term "regulation" ...does not include...decisions or orders in rate making, price fixing, or licensing matters....

6. As discussed in the Order, Columbia Energy Witness Dismukes proposed that the Commission initiate a rulemaking proceeding on competitive bidding to require SCE&G to undertake a competitive bidding process as the means to procure additional capacity resources. Order, p. 49. The Commission indicated that the “use of a formal competitive solicitation process, under appropriate circumstances, could produce low-cost, reliable power resources for South Carolina consumers.” Order, p. 51. If the Commission holds a generic proceeding instead of a rulemaking proceeding to decide the issue of the competitive bidding, its decision would be a policy statement instead of a regulation. Whether a particular agency proceeding will result in a regulation or a general policy statement determines whether the agency action establishes a binding norm. *Home Health Service, Inc. v. S.C. Tax Com’n*, 312 S.C. 324, 440 S.E.2d 375, 378 (Sup. Ct. 1994). “[W]hen there is a close question whether a pronouncement is a policy statement or regulation, the commission should promulgate the ruling as a regulation in compliance with the APA.” *Id.*

7. In order for the requirement to have the force and effect of law to apply to all electrical utilities under the Commission’s jurisdiction a “regulation” not a “policy statement” must be issued. A “regulation” is a legislative rule which generally has the force of law and becomes an integral part of the statute. *Faile v. S.C. Employment Security Com’n*, 267 S.C. 536, 230 S.E.2d 219, 221 (1976). An “interpretative rule” is entitled to respect by the Courts but is not binding upon them. *Id.* An “interpretative rule” is a rule which is promulgated by an administrative agency to interpret, clarify or explain the statutes or regulations under which the agency operates.” *Young v. S.C. Dept. of Hwys & Public Transportation*, 287 S.C. 108, 336 S.E.2d 879, 882-3 (Ct. App. 1985).

Several S.C. federal cases have also cautioned agencies to comply with the procedures established under the Federal Administrative Procedures Act so that their rulings would be given the force and effect of law. *Graham v. Lawrimore*, 185 F. Supp. 761, 763-4 (D.S.C. 1960), *aff'd*, 287 F.2d 207 (4<sup>th</sup> Cir. 1961).

While the Administrative Procedure Act and the Federal Register Act are set up in terms of making information available to the public, the acts are more than mere recording statutes whose function is solely to give constructive notice to person so do not have actual notice of certain agency rules. The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures are complied with, the agency or administrative rule has not been legally issued, and consequently it is ineffective.

*Id.* (citations omitted).

In another case, the Veterans Administration discharged a designated appraiser once he became a member of the S.C. General Assembly based on a “statement of policy” which the VA argued was an interpretative explanation of a duly promulgated regulation. *Harnett v. Cleland*, 434 F. Supp. 18, 21-22 (D.S.C. 1977).

It is well settled that a “statement of policy” such as is herein relied upon by the defendant, does not have any legal efficacy unless properly published in accordance with the provisions of the Administrative Procedures Act. There has been no showing that the VA Circular...was ever published in the federal register, and it, therefore, establishes neither a ‘binding norm’ nor is it finally determinative of the issues or rights to which it is addressed.

*Harnett*, 434 F. Supp. at 21, fn. 7.


8. S.C. Code Ann. Section 1-23-10 *et seq.* outlines the procedure to be used by the Commission in order to establish a rule which would be legally binding on all jurisdictional electric utilities. If the Commission does not follow the APA’s procedure and holds a generic proceeding, the decision it issues would be a “statement of policy” which would be legally ineffective. Such a result would raise questions concerning

whether the decision was binding and would create uncertainty which would be harmful to the proper functioning of an RFP process.

For the reasons stated herein we request that the Commission reconsider its decision in Order No. 2005-2 and clarify that it intends to proceed with a rulemaking proceeding leading to the promulgation of a regulation to address the competitive bidding process so that its decision will have the force and effect of law.

Respectfully submitted this 19<sup>th</sup> day of January, 2005.

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**BEFORE  
THE PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA  
DOCKET NO. 2004-178-E**

In Re:

Application of South Carolina )  
Electric & Gas Company for )  
Approval of an Increase in Electric )  
Rates and Charges )  
\_\_\_\_\_ )

**CERTIFICATE OF SERVICE**

This is to certify that I, Mary F. Cutler, a legal assistant with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below **Columbia Energy LLC's Petition for Clarification or Reconsideration of Order No. 2005-2** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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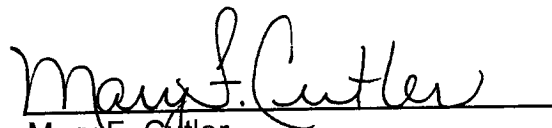
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Dated at Columbia, South Carolina this 19<sup>th</sup> day of January 2005.

  
Mary F. Cutler